July 25, 2018

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

Dear Ms. Dortch:

On Monday, July 23, 2018, Alton Burton, Jr. (Frontier), Roy Litland (Verizon), Nick Alexander (CenturyLink), and I met with Erin McGrath, Legal Advisor to Commissioner Michael O'Rielly to discuss the above-referenced proceeding.[1] During our meeting we emphasized our shared goals with the Federal Communications Commission (Commission) of increasing broadband availability and competition in the provision of high-speed services by moving forward with the draft order's proposal to create a presumption that ILECs are entitled to competitively neutral rates when attaching to investor-owned utility (IOU) poles.

We expressed concerns, however, that while the draft order would adopt the modified telecommunications rate as the presumptively "just and reasonable rate" for ILEC attachers,[2] it would do so only for "newly-negotiated pole attachment agreements" between ILEC attachers and electric utilities.[3] We explained that such an approach was too narrow, and would not attain the Commission's stated goal of "accelerat[ing] the deployment of next-generation infrastructure so that consumers in all regions of the Nation can enjoy the benefits of high-speed Internet access as well as additional competition."[4] For example, no matter how wrong the IOU was regarding any (long since past) purported benefits of an existing joint-use

[1] Notice of Proposed Rulemaking, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (released April 21, 2017) (*Notice*).

[2] Third Report and Order and Declaratory Ruling, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC-CIRC1808-03, ¶ 117 (released July 12, 2018) (*Draft Order*).

[3] *Id.*, ¶ 114.

[4] *Notice*, ¶ 5.

agreement, the IOU would now have every incentive to let these agreements – in many cases thirty, forty, fifty years old and greater – languish in "evergreen" status at unreasonable rates, entirely refusing to renegotiate. Indeed, some of our members have experienced such tactics in the past. Under such conditions, litigation would be considerably more likely, not less.

We further underscored the findings of USTelecom's November 2017 survey which showed that pole attachment rates paid by ILECs to IOUs have not declined despite the Commission's expectations in its 2011 Pole Attachment Order.[5] In contrast, pole attachment rates ILECs charge cable and competitive local exchange carriers (CLECs) with whom they compete have decreased. Thus, the "wide disparity in pole rental rates," that the Commission recognized as a barrier to broadband deployment in 2011,[6] has in fact widened. The survey also showed a significant difference in the ratio between the number of IOU poles to which ILECs attach and the number of ILEC poles to which IOUs attach, thereby creating an environment whereby "bargaining power is heavily skewed to the IOUs."[7]

USTelecom therefore proposed that the Commission conclude that the modified telecom rate should be the presumptive just and reasonable rate for ILEC attachers in all joint use agreements. If the Commission decides that a transition period is necessary, the Commission could establish that this would be the presumptive rate upon the renewal (including auto-renewal), extension, or renegotiation of any such joint use agreement, or associated rate terms or two years after the effective date of the order, whichever is sooner. As recently noted by AT&T, the current draft order is "risky and would leave ILECs in a virtual no-man's land," since ILECs have no mandatory right of pole access under Section 224. Moreover, absent the presumption, IOUs would not need to enter into new agreements with ILECs and would have no incentive to do so when it would mean lower rates.[8] This proposal, coupled with the right to refunds for overpayments as far back as the statute of limitations allows, would provide additional guidance to the industry and the appropriate incentive for IOUs to negotiate rate reductions that are consistent with the Act and the Commission's objective of removing rate disparities and promoting broadband deployment.

During the interim between adopting the presumptive rate discussed above, the Commission should immediately establish the pre-2011 upper bound telecommunications rate

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[5] *See*, Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84 (submitted November 21, 2017) (*USTelecom Analysis*).

[6] Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 76 FR 40817, FCC 11-50, ¶ 3 (released April 7, 2011).

[7] *USTelecom Analysis*, p. 7.

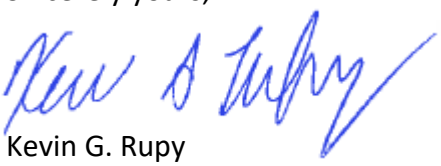
[8] *See*, Ex Parte Notice, from Frank S. Simone, AT&T, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84, p. 4 (submitted July 23, 2018).

for all ILEC pole attachment agreements and without need to examine whether the ILEC is similarly situated to other attachers. The Commission has already established such an upper bound, tied to the pre-2011 Pole Attachment Order telecommunications carrier rate, for complaint proceedings in which the ILEC fails to show that it is similarly situated to other attachers. The draft order would now apply this upper bound for situations when an electric utility rebuts the presumption that an ILEC is similarly situated to other attachers.[9] To the extent existing ILEC agreements provide ILECs benefits not available to other telecommunications attachers, those benefits do not justify denying ILECs just and reasonable pole attachment rates.

If an ILEC in a complaint proceeding is entitled, by default, to an attachment rate no higher than this upper bound, that upper bound should apply to all its pole attachment agreements with other utilities as of the effective date of the order. This clarification will not give ILECs rate parity with their competitors in attaching to poles, but it will provide some measure of rate relief without the need for protracted, resource-intensive disputes. The Commission should also specify that this decision constitutes a change in law.

Please contact the undersigned should you have any questions.

Sincerely yours,



Kevin G. Rupy
Vice President, Law & Policy

cc: Erin McGrath

[9] *Draft Order*, ¶ 120.